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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN MANUEL CERVANTES, JR.,

Defendant and Appellant.

2d Crim. No. B148731
(Super. Ct. No. VA057155)
(Los Angeles County)

Juan Manuel Cervantes appeals a judgment after conviction of robbery, assault by means likely to cause great bodily injury, sexual penetration by a foreign object, false imprisonment by violence, and burglary. (Pen. Code, §§ 211, 245, subd. (a)(1), 289, subd. (a)(1), 236, 459.)¹ We affirm.

FACTS

Juan D. met Juan and Jose Cervantes in November 1999 as Juan D. was walking to his employment at a fast-food restaurant. During the following weeks, Juan and Jose visited Juan D. at the restaurant. Juan D. gave them food and they gave him alcohol. Juan gave his telephone number to Juan D..

¹ All statutory references are to the Penal Code.

In November or December 1999, Juan and Jose visited Juan D. at his Norwalk apartment. The men consumed alcohol and the Cervantes brothers stayed overnight. Juan D. believed they were his friends.

Around midnight on December 6, 1999, Juan knocked on Juan D.'s door and asked to use the bathroom. Juan D. invited him inside.

Juan D. then noticed that Jose and another man were outside. Juan opened the door and invited them inside. Jose had a black gun and pulled back the slide. He demanded "all the money [now]." Jose threatened to kill Juan D. if he did not give them money. One man then ordered Juan D. to lie face down on the floor and to cover his head with a blanket.

When the men again demanded Juan D.'s money, he replied that he had none. After they kicked him in the ribs, Juan D. acceded. He walked to the bathroom and obtained money from a dresser and piggy bank. Jose and Juan took the money and ordered Juan D. to return to the floor and cover his head.

The men carried Juan D.'s possession from the apartment and threatened to rape him. They took Juan D.'s electronics, clothing, and Christmas gifts. Afterwards, they kicked Juan D. and inserted a spoon and a hairbrush into his rectum.

The men then bound Juan D.'s hands and feet with a string of Christmas lights. They threatened to kill him, and one man held a knife to his throat and said, "Bye, bye, baby."

The men left the apartment and Juan D. believed he was alone. He rose from the floor to find that Jose was still there. Frightened, Juan D. returned to the floor. As he lay there, Jose kicked him in the head.

Eventually, Jose left the apartment and Juan D. realized he was alone. He struggled to untie himself and then locked the door. Juan D. later threw the spoon, hairbrush, and Christmas lights into the apartment building trash container.

The following morning, Juan D. reported the incident to the apartment building manager. She saw that he had red marks on his wrists and ankles and that his face was bruised. The manager summoned police officers.

Using the telephone number provided by Juan D., police officers located a motel room occupied by Juan and Jose Cervantes. Inside, officers found some of Juan D.'s possessions. Later that evening, Juan and Jose arrived at the motel. The automobile that they drove also contained Juan D.'s possessions.

At trial, Juan Cervantes testified that he decided to rob Juan D. because Juan D. had caused him to argue with his male partner. During the robbery, Cervantes had two accomplices whom he did not know very well. He denied that he or the accomplices had a gun, that they kicked or struck Juan D., or that they sexually assaulted him.

The jury convicted Cervantes of robbery, assault by means likely to cause great bodily injury, one count of sexual penetration by a foreign object, false imprisonment by violence, and burglary. (§§ 211, 245, subd. (a)(1), 289, subd. (a)(1), 236, 459.) It also found, pursuant to section 667.61, subdivision (b), that Cervantes committed the sexual assault by force during a burglary. The jury could not agree upon a second count of sexual penetration by a foreign object, regarding the hairbrush.

The trial court found that Cervantes served three prior prison terms within the meaning of section 667.5, subdivision (b). It sentenced him to a prison term of 25 years and 8 months. The trial court stayed sentence on the burglary count pursuant to section 654 but rejected Cervantes's request to stay sentence regarding the assault and false imprisonment counts.

Cervantes appeals and contends: 1) the trial court erred by not instructing with CALJIC No. 3.02, regarding natural and probable consequences; 2) insufficient evidence supports the sex crime conviction beyond a reasonable doubt; and 3) section 654 precludes sentencing for assault by means likely to produce great bodily injury (count 2) and false imprisonment (count 5).

DISCUSSION

I.

Cervantes argues that the trial court erred by not instructing sua sponte with CALJIC No. 3.02, "Liability For Natural And Probable Consequences." He points out that the prosecutor mentioned the natural and probable consequences rule during summation when he stated: "[D]oesn't matter who kicked [Juan D.] Everything that happens after [entry into the residence] is a natural and probable consequence of going in and robbing somebody." Cervantes asserts that without proper instruction, the jury may have erroneously concluded that the forcible sex crime was a natural and probable consequence of the home invasion robbery. (*People v. Prettyman* (1996) 14 Cal.4th 248, 266-267 [trial court must instruct regarding natural and probable consequences doctrine when 1) prosecutor relies upon it to establish criminal liability and 2) sufficient evidence supports the theory].)

The trial court did not err because the prosecutor neither relied upon the natural and probable consequences doctrine to establish liability for the sex crime nor does sufficient evidence support criminal liability on that theory. (*People v. Prettyman, supra*, 14 Cal.4th 248, 266-267.) Although the prosecutor mentioned in summation the natural and probable consequences rule, he specifically discussed it regarding "who kicked" Juan D..

Even if the trial court erred by not instructing with CALJIC No. 3.02, there is no reasonable likelihood the jury convicted Cervantes of the sex crime as a natural and reasonable consequence of home invasion robbery. (*People v. Hickles* (1997) 56 Cal.App.4th 1183, 1198 [standard of review concerning CALJIC No. 3.02].) Forcible sexual penetration with a foreign object is not within "the normal range of outcomes" of a home invasion robbery. (CALJIC No. 3.02.)

Moreover, within a short time of entering Juan D.'s apartment, the men asked him if he "wanted dick" and promised to "give it to" him later. After ransacking Juan D.'s apartment, one man stated: "[Y]ou want dick, you are going to get dick."

Cervantes testified that he was angry with Juan D. because Juan D. caused him to break up with his male partner. The evidence thus suggests that the defendants planned and intended the forcible sexual penetration at the outset.

II.

Cervantes asserts that insufficient evidence supports his conviction of sexual penetration by a foreign object. (§ 289, subd. (a)(1); count 3.) He argues that Juan D.'s testimony was inconsistent with earlier testimony or statements and was inherently improbable. Cervantes points out that Juan D.'s testimony and statements varied regarding the sequence of events and whether he was penetrated with a brush or a brush handle. He adds that a conviction resting upon insufficient evidence violates due process of law.

In reviewing the sufficiency of evidence to support a judgment, we examine the entire record to determine if reasonable and credible evidence supports the decision of the trier of fact beyond a reasonable doubt. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Bohana* (2000) 84 Cal.App.4th 360, 368.) In this task, we draw all reasonable inferences in favor of the judgment and do not substitute our views for those of the trier of fact. (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) Matters of witness credibility and weight of the evidence fall within the sole province of the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Sufficient evidence supports the conviction of forcible sexual penetration by a foreign object. Juan D. testified that Cervantes and his accomplices forcibly inserted a spoon into his rectum. He suffered bleeding from the resulting abrasion. Although Juan D.'s testimony may have varied regarding the penetration by a hairbrush, his testimony concerning the spoon was consistent. The testimony of a single witness may support a judgment despite being contradicted or inconsistent in part. (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 366.)

III.

Cervantes argues that section 654 precludes punishment for assault by means likely to cause great bodily injury (count 2) and false imprisonment by violence (count 5) because these crimes either were incidental to or facilitated the sexual assault and robbery. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1216-1217 [§ 654 precludes punishment for kidnapping and rape where the offenses were an indivisible course of conduct].)

Section 654 precludes multiple punishment for a single act or omission, although the act or omission violates more than one criminal statute. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) An "act" within the meaning of section 654 may be a discrete physical act or a course of conduct that violates more than one statute. (*Ibid.*) The existence of a course of conduct depends upon the defendant's intent and objective. (*People v. Latimer, supra*, 5 Cal.4th 1203, 1208.) If the offenses are incident to one criminal objective, the defendant may be punished for only one offense. (*Ibid.*; *People v. Liu, supra*, 46 Cal.App.4th 1119, 1135.) "The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple. Each case must be determined on its own facts." (*People v. Liu, supra*, 46 Cal.App.4th 1119, 1135.)

Whether the defendant held more than one criminal objective is a factual question for the trial court. (*People v. Green* (1996) 50 Cal.App.4th 1076, 1088; *People v. Liu, supra*, 46 Cal.App.4th 1119, 1135-1136.) We affirm the trial court's factual findings providing that sufficient evidence supports them. (*Ibid.*)

Sufficient evidence supports the trial court's implied finding that Cervantes had independent criminal objectives when he assaulted Juan D. by kicking him and when he falsely imprisoned him by tying his hands and feet with a cord of Christmas lights. After taking his money and carrying his property away, Cervantes and the others returned to the apartment and kicked Juan D.. The men then sexually assaulted him and tied him with Christmas light cord. One man then held a knife to

his throat and said, "Bye, bye, baby." The assault and false imprisonment were not necessary to accomplish the robbery. The trial court was entitled to conclude, with sufficient support in the evidence, that the assault and false imprisonment were gratuitous acts of violence committed to humiliate and injure Juan D., independent of an objective to rob him. The trial court may impose punishment for independent criminal violations committed in pursuit of multiple objectives, although the violations share common acts or were part of an indivisible course of conduct. (*People v. Atkins* (1997) 56 Cal.App.4th 331, 338-339.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Robert J. Higa, Judge
Superior Court County of Los Angeles

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